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TO: Commission Secretary, Federal Election Commission

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COMMENTS OR INSTRUCTIONS:

Comments to Draft Advisory Opinion 2003-37.

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February 4, 2004

By Facsimile and Hand Delivery

**Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463**

Re: Draft Advisory Opinion 2003-37

Dear Commission Secretary:

The 324 undersigned environmental, civil rights, civil liberties, women's rights, public health, social welfare, senior, religious, and social justice organizations submit these comments on the General Counsel's draft of Advisory Opinion 2003-37 prepared in response to a request by Americans for a Better Country ("ABC"). For the reasons set forth below, we wish to express our profound concern over the broad scope of the draft opinion, both as it applies to federal political committees and as it appears to reach the educational, advocacy and voter participation activities of nonfederal political organizations and other nonprofit corporations. There is no authority under the Commission's regulations, the Federal Election Campaign Act ("FECA") or the Supreme Court's recent opinion in *McConnell v. FEC* to regulate these activities in the manner suggested in the draft opinion.

The organizations signing this letter are organized as nonprofit corporations under state law and are exempt from federal income taxation under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code ("Code"). Several organizations operate as qualified nonprofit corporations under 11 C.F.R. § 114.10. A number of the signatories have established separate segregated funds that are registered with the Commission as political committees; many also maintain nonfederal political organizations established under IRC section 527(e)(3) that are not registered with the Commission. The common interest among all of these organizations is that we regularly seek to educate the public and to advocate positions on progressive legislative and policy issues, including the positions taken by federal officeholders with respect to these issues.

If the draft opinion is adopted as proposed by the General Counsel, the result may be that we could no longer conduct these activities unless we raise and spend funds in accordance with the source and contribution limitations of the FECA. For most of our organizations, raising funds under these restrictions would be impossible. For those organizations represented here that are exclusively organized under IRC section 501(c)(3), we are not permitted under federal tax law to establish or maintain a separate segregated fund to engage in political activity. Therefore,

this opinion would entirely shut down many of the advocacy activities of our organizations. As 501(c)(3) and 501(c)(4) organizations, we are funded by large and small donors. Most of the undersigned organizations could not exist without the large grants and contributions from foundations, corporations and individuals that are prohibited under FECA. See 2 U.S.C. § 441a and 441b. Even those of us that operate federal political committees are able to raise relatively small amounts from our members for these purposes - amounts that could never support the extensive educational and advocacy programs we have conducted for many years. In any event these limited contributions are desperately needed to support our political programs as required by law. We therefore urge the Commission, with the greatest sense of urgency and in the strongest terms possible, not to issue the draft opinion in its present form.

Discussion

Although numerous aspects of the draft opinion are extremely troublesome, we are most concerned by the opinion's proposed reworking and expansion of the definition of "expenditures" in FECA § 431(9) to include any communication that "promotes, supports, attacks, or opposes" a candidate for federal office. While the facts of the current request concern a nonconnected political committee, by adopting this analysis the opinion can be read to extend to independent issue groups as well. As nonprofit corporations, the vast majority of us are flatly prohibited by FECA § 441b from making any "contribution or expenditure in connection with any election to any political office." Because we frequently refer to federal officeholders and candidates in our communications with the general public, and do so in a manner that may be highly critical of the officeholders' positions on issues, the proposed redefinition of "expenditures" would cause many of our currently lawful communications to become unlawful corporate expenditures.

Just in the past few months, for example, the organizations represented here have criticized Congress' and the Administration's policies and actions concerning such issues as tax cuts for the rich, Medicare and prescription drugs, oil exploration in the Arctic, nominations to the federal judiciary, abuses of civil liberties in connection with the war on terror, and numerous other issues. There is little doubt, we fear, that these communications would be perceived both by our opponents, who are constantly looking for ways to handcuff our efforts on behalf of our causes, and, based on the reasoning of this draft, by the Commission itself, as "opposing", or even "attacking," President Bush and other federal officeholders. This is the case even though these communications have not identified Mr. Bush or any other officeholder as a candidate for re-election, referred to the November 2004 election, or otherwise urged or implied opposition to the President's or any other individual's candidacy.

These communications have been aimed, not at these individuals as candidates, but as current officeholders in an attempt to influence legislation and public policy. Making it unlawful to criticize the policies and actions of a sitting President or Members of Congress except under the auspices of a registered political committee is one of the most fundamental attacks on the freedom of speech and freedom of association of American citizens ever contemplated by a governmental agency.

The proposed definition of "expenditures" is nowhere to be found in section 441b, even

though it is the only provision of federal election law governing contributions and expenditures by nonprofit corporations such as those represented here. Under the Supreme Court's decisions in *Buckley v. Valeo* and *Massachusetts Citizens For Life v. FEC*, section 441b was authoritatively construed to prohibit corporate communications that expressly advocate the election or defeat of clearly identified candidates. We have relied on this long-standing interpretation and have fully complied with it in all of our educational and advocacy programs. In passing the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress restricted certain limited broadcast communications, but it did nothing to modify the express advocacy test as applied to communications in other forms of media or even to broadcast communications disseminated outside of BCRA's 30/60 day black-out periods.

In redefining "expenditures," the draft opinion relies on the Supreme Court's recent decision in *McConnell v. FEC*, that upheld the constitutionality of BCRA's provisions limiting, and in some case prohibiting, political party committees from using nonfederal funds to support communications that "promote, support, attack or oppose" federal candidates. But, these restrictions are contained in a separate provision of BCRA, 2 U.S.C. § 441i, that applies exclusively to political parties and no other organization or entity. Most importantly, Congress did not amend the provisions applicable to corporations in a similar manner, nor did it revise the statutory definition of "expenditures" as proposed in the draft opinion.¹ The Commission has no authority to enact a new standard for corporate communications when Congress itself chose not to do so.²

The extent to which the draft advisory opinion reaches far beyond Congress' intent is also demonstrated by recent legislation governing so-called "527" or "soft-money" political

¹ The proponents of BCRA created the new restrictions on "electioneering communications" at least in part due to a recognition of the limits of the express advocacy test. Faced with numerous court decisions limiting express advocacy to the so-called "magic words," Congress attempted to regulate a narrow set of broadcast communications through the bright-line test created in the definition of "electioneering communications." In doing so, Congress clearly understood the constitutional difficulty faced in its task, demonstrated by the back-up definition in the event that Supreme Court rejected the bright-line test. It seems unlikely that Congress would have thought the electioneering communications provisions necessary if the Commission had the authority to unilaterally expand the express advocacy test.

² Furthermore, even if the Commission had such authority, it is prohibited from adopting a new substantive rule of election law in an advisory opinion. See 2 U.S.C. § 437f(b). Instead, the FECA provides that the Commission may only adopt rules through the administrative process, including notice and an opportunity for public comment and Congressional review. See 2 U.S.C. § 438(d). Should the Commission undertake such a rule-making to address the issue of nonprofit corporate communications in the future, we are confident that we could demonstrate that educational and advocacy activities of nonprofit corporations do not present the risk of corruption or appearance of corruption as the Supreme Court found with regard to political parties. Unlike the parties, we operate entirely independently of federal officeholders and candidates, which, under BCRA, are even severely limited in the manner in which they may raise funds for nonprofit organizations. See 2 U.S.C. § 441i(d).

organizations. Even prior to BCRA, Congress considered the operation of these organizations and concluded that, in the interest of greater public disclosure, they should register and file reports with the Internal Revenue Service. See Pub.L. 106-230, 114 Stat. 477 (July 1, 2000), codified at I.R.C. §§ 527(i)-(j). In 2002, shortly after it enacted BCRA, Congress again considered the disclosure obligations for these organizations and amended the registration and reporting requirements to ease the burden on some of the organizations covered by the 2000 amendments. See Pub.L. 107-276, 116 Stat. 1929 (Nov. 2, 2002). In neither instance, however, did Congress outlaw 527 political organizations or even authorize the IRS to curtail their activities. Furthermore, in ruling on the constitutionality of BCRA, the Supreme Court expressly noted that despite the Act's limitations on the fundraising abilities of political parties, "interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising." *McConnell v. FEC*, 540 U.S. _____ at _____ [slip op. at 80]. This plain reading of the statute is inconsistent with the approach of the proposed advisory opinion. If the Commission adopts the ABC opinion as drafted, it would be to appropriate to itself authority which Congress has twice refused to provide.

The draft opinion is also inconsistent with the Commission's own rulemaking excluding section 501(c)(3) organizations from the ban on electioneering communications. Several months ago, the Commission recognized the need to limit the scope of BCRA's prohibition on 501(c)(3) organizations to protect advocacy communications by these groups:

The Commission believes the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested, and which such organizations, by their nature, do not do.

Final Rules and Explanation and Justification, "Electioneering Communications," 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002)

Based on this draft opinion, it appears the Commission is prepared to consider denying all 501(c) organizations the ability to engage in this "highly desirable and beneficial activity." Even if this conclusion is not mandated by the terms of the opinion itself, it is the logical conclusion based on the reasoning set forth here.

Recent IRS guidance, in stark contrast to the position set forth in the draft opinion, confirms that 501(c) organizations are permitted to continue their advocacy activities, including attempts to influence legislative and administrative actions, throughout an election year. See Rev. Rul. 2004-6. These communications may in some cases oppose the position of an officeholder, who is also a candidate, in a manner that could be deemed, under the broad language of the General Counsel's draft, to "support" or "attack" a candidate for federal office. Nevertheless, the IRS ruled that such communications, under the circumstances described in the ruling, are consistent with the exempt purposes of a 501(c) organization and would not subject them to tax or jeopardize their exempt status.

While we have focused on the impact of the draft opinion on nonprofit organizations' educational and advocacy activities, we are also concerned about how the opinion would

handcuff our ability to undertake voter participation activities such as voter registration and get-out-the-vote, especially among minority and other under-represented communities. In response to question 8 of the opinion, the draft proposes that voter registration and GOTV public communications that do not expressly advocate, but "promote, support, attack or oppose" a federal candidate, must be paid entirely with federally permissible funds. Therefore, a nonprofit organization that informs the public that President Bush and his Administration has permitted corporations to increase harmful mercury emissions and encourages individuals to register to vote would be required to pay for this activity with federal funds. The regulations at section 114.4 state only that voter registration conducted by a corporation must not contain express advocacy or be coordinated with a candidate or political party. The Commission has no authority to broaden the restriction placed on these voter participation activities.

We would like to address two other aspects of the draft opinion, which cause equally deep concerns. First, the draft opinion states that any fundraising communications that "support, promote, attack or oppose" a federal candidate must be paid for with federally permissible funds and may only raise funds subject to the federal source and contribution limits. Unlike other portions of the opinion, this language is not even arguably limited to the nonconnected PAC making this request but applies to any solicitation. Thus, it appears that a fundraising letter from our organizations that appeals for contributions to "fight against President Bush's policies that threaten to undermine effective international family planning" would be subject to this requirement. The effect of such a conclusion is staggering. In addition to soliciting contributions, fundraising communications provide another critical avenue for reinforcing and generating public support for our advocacy messages. We, and other nonprofit organizations like us, would be required to choose to forgo either the messages that inform our supporters about the public policy debate or the funds that are vital to our existence. There is no legal basis for imposing this restraint on the broader nonprofit community.

Finally, the draft opinion proposes to extend the prohibition on foreign national contributions to *any* organizations that engage in voter registration, get-out-the-vote and other activities in connection with a federal, state or local election for public office as well as ballot measures. Many of our 501(c) organizations conduct these activities. For some of us, these activities comprise a major part of our program; others engage in these activities only as the need arises related to a specific policy objective or program. Our ability to continue to engage in these activities would be threatened if we were required to screen all of our contributions to determine whether or not they were made by a foreign national as defined under the FECA. The Commission, even in its own rulemakings on foreign national contributions, has never suggested that there is a need to extend the coverage of this provision to all nonprofit organizations that conduct voter participation activities. Such an intrusion would have a severe impact on these nonpartisan activities that are vital to fostering civic participation.

Conclusion

This draft opinion poses an unprecedented threat to the advocacy and educational activities of the undersigned organizations as well as many organizations that are not represented. We respectfully urge the Commission to reject this draft in its current form.

Respectfully submitted,

**Alliance for Justice
Leadership Conference
on Civil Rights
League of Conservation
Voters**

**NAACP National Voter Fund
NARAL Pro-Choice America
Planned Parenthood Federation
of America**

**People For the American Way
Sierra Club**

ACCESS, Inc.	Organizations	Planning Association
ACCESS/Women's Health Rights Coalition	Association for Neighborhood & Housing Development	Clermont Counseling Center
Adams County Citizens Alliance	Bailey House	Cleveland Tenants Organization
Adequate Housing for Missourians	Bethany House Services in Cincinnati	Cleveland Housing Network
Advancement Project	Bethlehem Haven	CNY Environmental Institute, Inc.
AIDS Alabama	Brattleboro Area Affordable Housing Corporation	Coalition for the Homeless, Inc.
AIDS Foundation of Chicago	Bread and Roses Community Fund	Coalition on Homelessness and Housing in Ohio
AIDS Action	Bronx AIDS Services	Coalition to Stop Gun Violence
AIDS Action Baltimore, Inc.	Cabell-Huntington Coalition for the Homeless	Columbus Coalition for the Homeless
AIDS Institute	Cancer Action	CommonBond Communities
AIDS Legal Council of Chicago	CAP Services, Inc.	Community Coordinated Child Care (4-C)
AIDS Treatment Data Network	Capital District African American Coalition on AIDS	Community Partners for Affordable Housing, Inc.
AIDS ReSearch Alliance	Catholic Charities AIDS Services	Community Stabilization Project
Albany Advocacy Center	Catholics for a Free Choice	Community Toolbox for Children's Environmental Health
Albuquerque Mental Health Housing Coalition, Inc.	Catholic Health Initiatives	Connecticut AIDS Residence Coalition, Inc.
Arlington Community Temporary Shelter	Center for American Progress	Connecticut Housing Coalition
Alliance of Cleveland HUD Tenants	Center for Housing Policy	Corporation for Supportive Housing
Alliance for Better Housing	Center for Impact Research	Cooperative Services Inc.
Alliance for Healthy Homes	Center for Law and Social Policy	Contoocook Housing Trust
Alliance for Retired Americans	Center for Responsible Lending	Corporation for Supportive Housing
American Association of University Women	Center for Women and Families	Crossroads Urban Center
American Friends Service Committee	Central City Concern	Cumberland Court Housing Commission, Inc.
Americans for Democratic Action	Central City Development Council, Inc.	Dane Fund
American Planning Association	CHAMP	Davidson Housing Coalition
Amnesty International USA	Charlotte County Homeless Coalition, Inc.	Disabled Action Committee
Aurora Project, Inc.	Chicago Community Development Corporation	Domus Transitional Housing of St. Cloud Minnesota
Appleseed Community Mental Health Center, Inc.	Chicago Jobs Council	Earthjustice
Assistance Fund	Choice USA	East Bay Asian Local Development Corporation
Asian & Pacific Islander American Health Forum	CitiWide Harm Reduction	
Association of Asian Pacific Community Health	Citizens Housing Coalition	
	Citizens' Housing and	

East Brunswick Community Housing Corporation	HOME Line	McKinley Towers Tenant Association
East Metro Women's Council	Homeless and Housing Coalition of Kentucky	Mercy Housing California
Eden Housing, Inc.	Homes for Families	Mercy Housing, Inc.
Episcopal Diocese of Ohio	Housing Alliance of Pennsylvania	Mercy Services Corporation
Equinox	Housing & Community Development Network of New Jersey	Metropolitan Boston Housing Partnership
Fairmount Housing Corporation	Housing Development Consortium of Seattle - King County	Metropolitan Housing Coalition
Fairness in Rural Lending	Housing Development Corporation	Metropolitan Interfaith Council on Affordable Housing
Family Services of King County	Housing Preservation Project	Metropolitan Tenants Organization
Fayetteville Urban Ministry	Housing Resources Group	Mi Casa, Inc.
Feminist Majority	Illinois Drug Education and Legislative Reform	Mid-Minnesota Legal Assistance
Florida Coalition for the Homeless	ICAN, Inc.	Minnesota Coalition for the Homeless
Florida Housing Coalition	Inglewood Neighborhood Housing Services	Minnesota Housing Partnership
Florida Non-Profit Housing, Inc.	Interfaith Housing of Western Maryland	Montpelier Housing Task Force
Food Finders	Interdependent Living Solutions Center	Montrose Clinic
Fordham Bedford Housing Corporation	Improving Kids' Environment	Nashville CARES
Friends Committee on National Legislation	Jefferson Behavioral Health System	National Abortion Federation
Friends of the Earth	Jewish Community Action	National AIDS Housing Coalition
Friends of Midcoast Maine	J-Linch Inc.	National Alliance of HUD Tenants
Friends of Youth	King County Coalition Against Domestic Violence	National American Indian Housing Coalition
Frontier Housing	Latino Commission on AIDS	National Congress for Community Economic Development
Gay Men's Health Crises	Lawyers' Committee for Civil Rights Under Law	National Council of Jewish Women
Genesis Community Loan Fund	Learning Disabilities Association of Washington	National Family Planning and Reproductive Health Association
Goodhue County Habitat for Humanity	Lifelong AIDS Alliance	National Housing Conference
Grand Valley Housing Initiatives	Los Angeles Housing Partnership, Inc.	National Housing Law Project
Greater Metropolitan Housing Corporation of the Twin Cities	Low Income Investment Fund	National Low Income Housing Coalition
Greater Syracuse Tenants Network	Lutheran Social Services of Southern California	National Low Income Housing Policy Center
Greene County Fair Housing	Maine Lead Action Project	National Organization for
Harm Reduction Coalition	Maxfield Research Inc.	
Health and Disability Advocates		
HEARTH		
HELP		
Hepatitis Education Project		

Women	Partnership Center, Ltd.	Society for Equal Access
National Organization for Women Foundation	Partners In Active Living Through Socialization, Inc.	Society of St. Vincent de Paul, Council of Louisville, Inc.
National Partnership for Women & Families	Philadelphia Association of Community Development Corporations	Southern California Association of Non-Profit Housing
Native American Rights Fund	Physicians for Social Responsibility	Stopping Woman Abuse Now
Neighborhood Development Services, Inc.	Planned Parenthood Population Action International	Staten Island AIDS Task Force
Neighborhood Housing Services of Fort Worth and Tarrant County, Inc.	Presbyterian Church (USA), Washington Office	Suburban Essex Housing Development Corp.
Neighborhood Housing Services of Waterbury, Inc.	Project H.O.M.E.	The Home Connection
New Home Development Company, Inc.	Provincetown AIDS Support Group	Title II Community AIDS National Network
New Housing Opportunities, Inc.	Psychiatric Rehabilitation Services, Inc.	TransAfrica Forum
Nevada Shakespeare Company	Religious Coalition for Reproductive Choice	Treatment Action Group
Non-Profit Housing Association of Northern California	Religious Coalition for Reproductive Choice Educational Fund	TuscoBus, Inc.
Northeast Missouri Client Council for Human Needs, Inc.	Residents for Affordable Housing	United Ministries
Northeast Ohio Coalition for the Homeless	Rhode Island Coalition for the Homeless	United Pennsylvanians
North Carolina Coalition To End Homelessness	Rhode Island Public Housing Tenants Association	Utah HUD Tenants Association
Northwoods Wilderness Recovery	Rock River Valley Mental Health Association	Utah Progressive Network
NOW Legal Defense and Education Fund	Rogers Park Community Action Network	Utah SOS 8 Coalition
NRDC Action Fund	Roots of Mankind Corp.	Virginia Housing Coalition
Office of Rural & Farmworker Housing	RPJ Housing	Virginia Housing Coalition Information Service
Ohio Association of Second Harvest Foodbanks	Rural California Housing Corporation	Wake Housing and Homeless Coalition
Older Women's League	SAGE	Washington Defender Association's Immigration Project
OMB Watch	San Diego Housing Federation	Washington's Action for New Directions
Oregon Housing and Community Services	San Francisco AIDS Foundation	Washington Association of Churches
Organ Health Forum	Scott County Housing Council	Washington Low Income Housing Alliance
Otero Arts Council	Sierra Club	Wellspring
Restart Inc.	Sisters of Mercy of the Americas Regional Community of Chicago	West Hollywood Community Housing Corporation
		West Central MN Housing Partnership
		Western States Center
		Westgate Housing Inc.

Westmoreland Human Opportunities, Inc.	National Housing Institute	P.A.L. Mission
White Earth Investment Initiative	Center for Civil Justice	Community Development
Wilderness Society	Community Housing Coordinators	Law Center
Will-Grundy Center for Independent Living	Statewide Housing Action Coalition	AIDS Alliance for Children, Youth and Families
Wisconsin Citizen Action	The November Coalition	Neighborhood Housing Services of Asheville, NC, Inc.
Wisconsin Partnership for Housing Development, Inc.	Northwoods Wilderness Recovery	National Community Capital Association
YouthLink	Ohio Empowerment Coalition	Cleveland Diocesan Social Action Office
Greater Upstate Law Project	Tennessee Fair Housing Council	Chenango Housing Improvement Program, Inc.
New York AIDS Coalition	Jewish Alliance for Law and SocialAction	The Other Place
Amethyst, Inc.	The Advocacy for the Poor	Environmental Health Watch
Virginia Housing Development Authority	Trinity Services, Inc. of Joliet, IL	Mississippi Center for Justice
Institute for Caregiver Education	FreeStore/FoodBank Inc.	The Brady Campaign to Prevent Gun Violence United with the Million Mom March
FACES of Stark County, Inc.	Environmental Working Group	Latino Commission on AIDS, New York, NY
Lutheran Social Services of Illinois	AIDS Treatment Activists Coalition	Unitarian Universalist Service Committee
Center for Health and Gender Equity	St. Vincent DePaul Society, Dayton District Council	Delaware Valley
National Womens Law Center	Coalition of Citizens With Disabilities in Illinois	The I Am Your Child Foundation
Boston Community Loan Fund	The Christian Community Action Coalition - Addictions Outreach	Women Employed, Chicago, IL
Chemical Sensitivity Disorders Association	Ministry Inc.	Housing Rights, Inc.
Citizens for Elderly Services, Inc.	Northwestern Housing Enterprises, Inc.	Just Harvest, A Center for Action Against Hunger, Pittsburgh, PA
National Latina/o Lesbian, Gay, Bisexual & Transgender Organization	American Civil Liberties Union	Institute for Policy Studies, Paths for the 21 st Century Project
South Side Office of Concern	Welfare Law Center	
National Law Center on Homelessness & Poverty	North Carolina Community Action Association	
Citizen Action/Illinois	South Westerly Tenants Organization	
VIDA/SIDA		
Housing Virginia Campaign, Inc.		

cc: **Office of General Counsel**
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